



FOURTH JUDICIAL CIRCUIT OF VIRGINIA
CIRCUIT COURT OF THE CITY OF NORFOLK

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BY: *[Signature]*

100 ST. PAUL'S BOULEVARD
NORFOLK, VIRGINIA 23510

EVERETT A. MARTIN, JR.
JUDGE

February 15, 2012

Bernard A. Pishko, Esq.
Office of the City Attorney
900 City Hall Building
810 Union Street
Norfolk, Virginia 23510

Kevin E. Martingayle, Esq.
Stallings & Bischoff
P. O. Box 1687
Virginia Beach, Virginia 23451

Gerald L. Harris, Esq.
5416 Tidewater Drive
Norfolk, Virginia 23509

Thomas B. Kelly, Esq.
Bowman, Green, Hampton & Kelly
501 Independence Pkwy, Suite 201
Chesapeake, Virginia 23320

Andrew M. Sacks, Esq.
Sacks & Sacks
150 Boush Street, Suite 501
Norfolk, Virginia 23510

Re: **Norfolk Community Services Board v. Linda M. Berardi, et al.**
Civil No.: CL11-2968

Dear Gentlemen:

This matter came before the court on February 13, 2012, on the amended complaint and demurrers, pleas in bar, and motions filed by the defendants.

The plaintiff (the "CSB") complains that Jill McGlone ("McGlone"), a former employee, improperly received a salary and other benefits from the time of her suspension on April 14, 1998, until May 15, 2010. (Nos. 14, 25). (The numbers in parentheses refer to paragraphs of the amended complaint.) The CSB seeks to recover the value of the salary and benefits from McGlone and these four other defendants.

Linda Berardi ("Berardi") was the CSB's Human Resource Officer from 2002 until after McGlone's termination. (Nos. 5, 50). Her duties included compensation, classification, "payroll enrollment and transactions," and benefits administration. (No. 35).

Anthony Crisp ("Crisp") was the Director of Clinical Services for the CSB, and he suspended McGlone. (Nos. 4 and 14). His duties included the coordination of substance abuse services, employee performance reviews, and disciplinary actions. (No. 71).

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730-31. As in *Belcher*, the claim here is for money damages, the traditional legal remedy, and Code §8.01-230 does not apply as the relief sought is not solely equitable.

The CSB claims the tolling provision of Code §8.01-229(D) allows it to recover from McGlone the damages it incurred more than three years before it filed suit. That sub-section provides, as applicable:

When the filing of an action is obstructed by a defendant's...using any other direct or indirect means to obstruct the filing of an action, then the time that such obstruction has continued shall not be counted as any part of the period within which the action must be brought.

The CSB conceded at argument that McGlone took no action to obstruct the filing of this action, but it claims that other defendants did. The CSB offered no authority that would apply this sub-section to one defendant when another defendant acted to obstruct the filing of an action, and in the absence of such authority or, perhaps, a relationship that would make the non-obstructing defendant vicariously liable for the acts of the obstructing defendant, I decline to so construe the statute. See former Code §8-33; *Culpepper National Bank v. Tidewater Improvement Co., Inc.*, 119 Va. 73, 83-83, 89 S.E. 118, 121 (1916).

I find the CSB may recover from McGlone for unjust enrichment for salary paid and benefits bestowed within the three years before the suit was filed, that is, since April 12, 2008. The CSB's claim for salary paid and benefits bestowed before that date is time barred.

Fraud and Negligence

The CSB sues Berardi, Crisp, Wise, and Pratt for actual or constructive fraud and negligence or gross negligence. Actual fraud is a false representation of a material fact made intentionally and knowingly with the intent to mislead, which representation is relied upon by the plaintiff and causes him damage. Constructive fraud differs in that the representation need only be made innocently or negligently, and there need not be an intent to mislead. *Evaluation Research Corp. v. Alequin*, 247 Va. 143, 439 S.E.2d 387 (1994).

The defendants demur contending these claims are barred by what is known as the source of duty rule. This rule is designed to maintain the separation of the law of contracts from that of torts. The law of contracts exists to protect the expectations of parties to a contract. The damages a plaintiff may recover in a contract action are usually rather limited. Because of the limited damages that may be recovered in a contract action, lawyers for plaintiffs often try to sue in tort, where the damages can be much higher. The primary purpose of the law of torts is the protection of persons and property from injury, and it affords a remedy only for violations of

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common law and statutory duties involving the safety of persons and property that are imposed to protect the broad interests of society. *Filak v. George*, 267 Va. 612, 594 S.E.2d 610 (2004).

A second reason a lawyer for a plaintiff may seek to sue in tort (especially for fraud) is the statute of limitations. In actions for breach of contract, the period of limitation begins to run when the contract is breached and not when the resulting damage was discovered. *Code* §8.01-230. For a claim of fraud, the limitation period begins to run when the fraud is discovered or by the exercise of due diligence reasonably should have been discovered. *Code* §8.01-249(1).

In deciding whether a plaintiff may sue in tort, the Court examines the source of the duty the defendant owed the plaintiff. If the act complained of would not give rise to a cause of action in the absence of a contract between the parties – because no duty to do what is complained of existed apart from the contract – then the action is founded on contract, not tort. However, if the relation between the plaintiff and the defendant is such that a duty arises from the relationship, irrespective of the contract, then the action is one for tort. *Richmond Metropolitan Authority v. McDevitt*, 256 Va. 553, 507 S.E.2d 344 (1998). The actions of one breaching a contract can be both a breach of contract and a tort; however, to allow the plaintiff to sue in tort, the duty the defendant tortiously or negligently breached must be a common law or statutory duty, not one existing between the parties solely by virtue of a contract. *Foreign Mission Board v. Wade*, 242 Va. 234, 409 S.E.2d 144 (1991); *Kaltman v. All-American Pest Control*, 281 Va. 483, 706 S.E.2d 864 (2011).

The duties Berardi, Crisp, Wise, and Pratt are alleged to have violated and that are the bases for the fraud claims are set forth in paragraphs 35-140 and 164-165 (pages 7-33 and 39-40) of the amended complaint.

The CSB alleges Berardi, *inter alia*: failed to conduct an investigation of McGlone's violation of CSB policies (No. 49), improperly treated McGlone as being on administrative leave with pay (No. 50), did what was necessary to ensure McGlone continued to be paid (No. 51), failed to advise Crisp to perform a performance evaluation on McGlone (No. 55), reviewed numerous labor reports indicating McGlone had used leave time and not done any work (Nos. 57-59), misrepresented that McGlone was entitled to be paid (No. 60), misrepresented that McGlone was entitled to health benefits (No. 66), and misrepresented that McGlone was entitled to pay increases (No. 69).

The CSB alleges Crisp, *inter alia*: failed to resolve McGlone's suspension without pay (No. 75), signed numerous labor reports showing McGlone was on administrative leave with pay and had done no work (Nos. 76-82), submitted budgets including funding for McGlone's position (No. 91), and failed to complete a performance evaluation for McGlone (No. 97).

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The CSB alleges Wise, *inter alia*: failed to complete an investigation of McGlone's conduct that led to her suspension (No. 106), failed to resolve McGlone's suspension (No. 109), failed to exercise oversight of McGlone's personnel records (No. 111), failed to correct McGlone's accrual of annual leave (No. 120), presented a financial summary to the board of directors identifying McGlone's position as filled (No. 126), and presented budgets recommending funding to McGlone (No. 129).

The CSB alleges Pratt presented "performance contracts" to the board of directors that indicated McGlone's position would result in some contribution of services to the CSB's clients (Nos. 155-157, 164).

It is evident that all these duties alleged to have been violated arose out of each defendant's employment with the CSB. The CSB admits this throughout the amended complaint (Nos. 49, 52-55, 62, 96-97, 110-111, 120, 166-172, 174-177, 179-188, 190-192). The relation of employer and employee can only exist by virtue of contract. *Humphreys v. Boxley Bros. Co.*, 146 Va. 91, 97, 135 S.E. 890, 891 (1926). At argument the CSB relied on *Hilh, Rogal and Hamilton Co. v. DePew*, 247 Va. 240, 440 S.E.2d 918 (1994), to claim an employment relationship need not be contractual. However, that case only held that an employee's breach of contractual duties after he ends his employment may constitute an improper method to support his former employer's claims against him for intentional interference with an at-will contract with a third party and conspiracy to interfere with that contract.

The allegations here are similar to those the Supreme Court held improper in *Richmond Metropolitan Authority*. The defendant there, a contractor, had built a large structure for the Authority. More than five years after the structure was completed, the Authority discovered that some of the work contracted for had been done improperly or not at all. The Authority sued the contractor for breach of contract and actual and constructive fraud. The trial court dismissed the breach of contract claim on a plea of statute of limitations and the Authority did not appeal that ruling.

The Authority also sued in fraud hoping to avoid the statute of limitations. The bases of the Authority's fraud claims were: (1) the defendant's submission of false payment applications certifying the work had been performed in accordance with the contract documents, and (2) the defendant's physical concealment of its non-compliance with the design criteria. The Supreme Court held the claim for constructive fraud was "nothing more than allegations of negligent performance of contractual duties and are, therefore, not actionable in tort. A tort action cannot be based solely on a negligent breach of contract." 256 Va. at 559, 507 S.E.2d at 347. With respect to the claim for actual fraud, the Supreme Court held each misrepresentation "related to a duty or obligation that was specifically required by the...[c]ontract." *Ibid.*

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National Bank, supra. Constructive fraud will not toll the running of the statute of limitations. The character of the fraud necessary to toll the statute must involve moral turpitude. *Richmond Redevelopment & Housing Authority v. Laburnum Const. Co.*, 195 Va. 827, 840, 80 S.E.2d 574, 582 (1954).

What is Pratt alleged to have done? In short, it is alleged he "knew or should have known" that Berardi, Crisp, and Wise were acting in such a manner that McGlone continued to be paid while not working; that he submitted annual "performance contracts" to the CSB's board of directors identifying the full time employees the CSB would employ and the costs necessary to compensate them and that McGlone's position was among them (Nos. 145-158).

I find it curious that the CSB alleges Pratt "knew or should have known" certain things. The "knew or should have known" standard is usually applied in tort cases, not contract actions. I also find it curious that the CSB never unequivocally alleges that Pratt knew McGlone was being paid while not working. The CSB alleges Berardi knew this "as early as 2002" (No. 37); that Crisp knew this in 1998 (Nos. 14, 82); that Wise knew it in 2003 at the latest (No. 40).

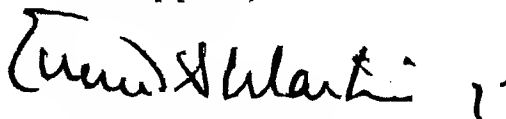
These allegations simply do not support a claim that Pratt concealed a cause of action the CSB had against him for breach of contract or obstructed its filing. Even if I were to accept the CSB's argument that the actions of Berardi, Crisp, and Wise can toll the statute of limitations on this claim, the amended complaint does not show actions taken to conceal the cause of action; rather, it is replete with actions taken to document improper payments.

I thus grant Pratt's plea in bar in part. As the contracts are written, a five year statute of limitations applies to this claim. *Code of Virginia* §8.01-246(2). The CSB filed its original complaint on April 12, 2011; thus any breaches of Pratt's contract occurring before April 12, 2006, are time barred.

The CSB shall produce to Pratt and file with the Clerk copies of Pratt's contracts for July 1, 2005 – June 30, 2006, July 1, 2006 – June 30, 2007, and July 1, 2007 – March 31, 2008.

In view of these rulings, I need not decide the other matters the defendants have raised. I attach an order reflecting these rulings.

Sincerely yours,



Everett A. Martin, Jr.
Judge

EAMjr/mls

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF NORFOLK

NORFOLK COMMUNITY SERVICES BOARD,

Plaintiff,

v.

Civil No. CL11-2968

LINDA BERARDI, *et al.*,

Defendants.

ORDER

For the reasons stated in the Court's letter of February 15, 2012:

1. Defendant McGlone's plea of the statute of limitations is SUSTAINED and the plaintiff may not recover from her any salary paid or benefits bestowed before April 12, 2008.
2. The demurrers of defendants Berardi, Crisp, Wise, and Pratt to the claims of actual fraud, constructive fraud, negligence, and gross negligence (Counts 2, 3, 4, 6, 7, 8, 9, and 10) are SUSTAINED and these claims are DISMISSED without leave to amend.
3. Defendant Pratt's motion craving *oyer* is GRANTED and the plaintiff shall produce to Pratt and file with the Clerk within thirty days copies of Pratt's contracts for July 1, 2005 – June 30, 2006, July 1, 2006 – June 30, 2007, and July 1, 2007 – March 31, 2008.

4. Defendant Pratt's plea of the statute of limitations is SUSTAINED and the plaintiff may not recover from him for any breaches of contract occurring before April 12, 2006.
5. The style of the case is changed to *Norfolk Community Services Board v. Jill D. McGlone and George W. Pratt*, and all future filings shall be so designated.

Endorsements are waived pursuant to Rule 1:13.

ENTER: February 15, 2012


Judge